Petition

81-1308

No.

Office - Supreme Court, U.S.
FILED
JAN 13 1982
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

STEPHEN L. McMURTRY,

Petitioner,

vs.

STATE OF ILLINOIS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST JUDICIAL DISTRICT

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QUESTION PRESENTED

Whether Illinois' Two-Tiered Standard to Evaluate Competency of Counsel is Violative of an Individual's Sixth Amendment Guarantee of Effective Counsel as Articulated by this Court in *Cuyler v. Sullivan*, 446 U.S. 335 (1980)?

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IN THE

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OCTOBER TERM, 1981

STEPHEN L. McMURTRY,

Petitioner,

vs.

STATE OF ILLINOIS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST JUDICIAL DISTRICT

Petitioner hereby petitions for a writ of certiorari to review the decision of the Appellate Court, First Judicial District, of the State of Illinois, which was entered on March 23, 1981. The Illinois Supreme Court denied discretionary review on October 19, 1981.

OPINIONS BELOW

The opinion of the Appellate Court of Illinois is not reported and is printed herein, *infra*, as Appendix A.

The denial of the discretionary review is not reported and is printed herein, *infra*, as Appendix B.

JURISDICTIONAL STATEMENT

The judgment of the Appellate Court of Illinois was entered on March 23, 1981. A Petition for Rehearing was timely filed. The Petition was denied April 22, 1981. A Petition for Leave to Appeal to the Illinois Supreme Court was timely filed. The Petition was denied October 19, 1981.

Petitioner has raised the Sixth Amendment right of effective counsel in his brief to the Appellate Court of Illinois. Petitioner has stated, through Appellate counsel, that he had not received effective assistance of counsel from his trial counsel. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment VI (1789):

"Jury Trial for Crimes, and Procedural Rights"

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses in his favor, and to have Assistance of Counsel for his defense.

United States Constitution, Amendment XIV (1868):

"§1. Citizenship Rights Not to be Abridged by States"

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF FACTS

A. Introduction

On August 23, 1979, the Petitioner was found guilty of the felonies of rape and armed robbery. Petitioner was sentenced to serve 6 years in the Illinois Department of Corrections with a mandatory supervised release of 3 years. Petitioner had served honorably in the United States Marine Corps, including 13 months in Viet Nam. Petitioner had been working 10 years at Wyman Gordon, owned his own home and did not have a criminal record.

Although Petitioner was charged with two serious felonies, only four witnesses were called to testify throughout the pre-trial and trial proceedings. One of these four witnesses included Petitioner's wife, Marilyn, who testified only as a character witness. Petitioner was represented by privately retained counsel.

B. Pre-Trial Proceedings

Prior to trial, Petitioner's trial counsel filed a Motion to Quash Arrest and Suppress Evidence. Essentially, the bases for the motion were arrest without warrant and without probable cause and, secondly, seizure without warrant and without consent.

Trial counsel for Petitioner called only one witness during this hearing. The one witness called and examined was one of the arresting police officers.

The essential issues before the Court at this stage were whether the Petitioner had consented to the search of his house; whether Petitioner had been properly informed of his *Miranda* rights, and whether Petitioner

had owned or possessed a gun which was seized by the arresting officers.

Officer Newton was the only witness to testify in the pre-trial hearing. On direct examination by Petitioner's counsel, he testified that after receiving a radio assignment, he and Officer Ristenpart interviewed the prosecutrix. Subsequently, the police officers proceeded to Petitioner's home, and without guns drawn, they informed the Petitioner of the charges against him. The police officer testified that Petitioner invited the police to search his home. One officer immediately proceeded into a bedroom and seized an automatic gun. On cross-examination by the prosecution, the officer essentially reiterated and re-inforced his direct testimony.

During Officer Newton's testimony, it was established that he had no knowledge as to the ownership of the gun seized during the arrest. He testified that the other arresting policeman, Officer Ristenpart, was responsible for this investigation. Parenthetically, it must be noted that at no time throughout the entire pre-trial, trial, and post-trial proceedings was ownership of this gun ever established.

Therefore, the un-rebutted and re-inforced testimony of Officer Newton was the only evidence submitted to the trial judge from which to base his decision on Petitioner's pre-trial motion to quash and suppress. There was no testimony from the Petitioner, the prosecutrix, or the other police officer who was responsible for investigating the ownership of the gun.

We only learn later when the Petitioner testified at trial that he had never "invited" the police officers into his home, that he was faced with officers who had their guns drawn, and that he denied owning the gun in question.

However, without this testimony and other pertinent testimony, the trial court facilely denied Petitioner's motion. In ruling against Petitioner, the trial court stated that the police officers "were invited to tear the place apart." The court further found "that the entry, the invitation to look, all were made when they could have been refused." The court also found that probable cause to arrest existed once they found the weapon. The court concluded that it was not a search but "a recovery of evidence after an invitation to look."

C. Bench Trial

The prosecution only called the prosecutrix to testify on behalf of the State. Trial counsel for Petitioner agreed to stipulate to the admission of the transcript of Officer Newton's testimony at the pre-trial hearing. Further, Petitioner's trial counsel stipulated that the gun referred to in Newton's testimony was the same gun admitted as Peoples' Exhibit No. 2. Petitioner's trial counsel subpoenaed no witnesses on behalf of Petitioner. For the defense, counsel only called the Petitioner and Petitioner's wife—as a character witness.

The prosecutrix testified that she first had met the Petitioner at a lounge through mutual friends. She asked the Petitioner if he wanted to join her and go to a party at her friend's home. Petitioner agreed and said he wanted to stop home to pick up some money. At his home, Petitioner received a phone call from a woman. He stayed on the phone for a long time and appeared angry. Once Petitioner got off the phone, he began to make advances to the prosecutrix. According to her testimony, the Petitioner pulled out a gun from his wardrobe, forced her to engage in sexual intercourse, and at gun-point took $105.00 in cash. The prosecutrix testified that he also struck her near the eye. Further,

she testified that she was unmarried, had several children, and worked part time as a hairdresser. On the night of the incident, she had taken $25.00 with her from home. She testified that her friend Marsha had given her $85.00 on the night of the incident as a payment of a loan.

Petitioner testified that he had met the prosecutrix at the Melody Lounge while stopping after work to pick up beer. He was introduced to the prosecutrix through mutual friends. Petitioner was told that the complainant wanted to meet him. She asked Petitioner if it would be alright if they drove around and talked. Petitioner agreed. She asked Petitioner if he was married or if he lived at home. Petitioner stated that he was unmarried and owned his own home. Eventually, the prosecutrix asked if they could stop so she could see his home. She had indicated that she had been looking for a place to live. Petitioner agreed.

Almost immediately upon arriving and after parking his car in the garage, Petitioner received a long distance phone call from his brother. Petitioner stayed on the phone for a long time and it was a pleasant call. When Petitioner hung up the phone, he noticed that the prosecutrix was in his bedroom going through his drawers. Petitioner asked what she was doing. She said she was looking for a towel so she could freshen up. The prosecutrix took the towel and a bathrobe and went into the bathroom. She came out of the bathroom with just the robe on. Petitioner changed and they eventually engaged in sexual intercourse. Shortly thereafter, she told the Petitioner he could well afford to pay for her services. She asked how much money he had. Petitioner told her he had approximately $130.00 or $140.00. She told the Petitioner that he was going to pay for her

services. The petitioner refused to pay her and she called him a cheap bastard. The prosecutrix told him he was going to find himself in a lot of trouble if he did not pay her. Petitioner asked her to leave. Petitioner never pulled a gun on her and did not own a gun. When the complainant was leaving after she failed to secure a taxicab, she grabbed a lamp and swung it at the Petitioner. When the Petitioner grabbed the lamp away from her, the lamp hit her in the face. When the complainant left, Petitioner took a shower.

Shortly after getting out of the shower, Petitioner's doorbell rang. Petitioner went to the window and looked out the door. One policeman had his gun drawn and had it up in the air. The other police officer was standing on his porch ringing the bell. The Petitioner answered the door. The police officers stated that the complainant had said that he had just raped and robbed her. The officers asked if they could come in. The Petitioner asked for a search warrant. The police officers told him they were going to search the place. One officer stayed with the Petitioner in the front room while the other officer went directly into the bedroom. This officer came out of the bedroom with a gun. Petitioner denied owning the gun.

As stated earlier, at no time was the question of the ownership of the gun resolved.

In finding the Petitioner guilty of both rape and armed robbery, the trial court stated that his decision most importantly depended on the resolution of the gun. The basis for his decision, however, was limited only to the conflicting testimony of the complainant and Petitioner.

D. Post-Trial Proceedings And Appeal

The same attorney who represented Petitioner at trial filed his post-trial motions (not including the issue of ineffective assistance of counsel) which were denied. Subsequently, Petitioner retained separate Appellate counsel. Petitioner's brief to the Illinois Appellate Court was filed June 30, 1980. Among other things, this brief argued that Petitioner's Sixth Amendment guarantee of ineffective counsel had been violated. On March 23, 1981, the Appellate Court issued its opinion affirming the conviction. On the question of ineffective counsel, the Court stated that the standard for "retained" counsel is whether from the totality of the proceedings his conduct amounts to no representation at all or reduces the proceedings to a sham or farce. *People v. Murphy* (1978), 72 Ill.2d 421, 436, 381 N.E.2d 677.

After a petition for rehearing before the Appellate Court was denied, Petitioner filed his Petition for Leave to Appeal to the Illinois Supreme Court. Among other things, the petition argued the Sixth Amendment question and attacked the Illinois two-tiered standard for review of incompetency of counsel. This petition was denied October 19, 1981.

REASONS FOR GRANTING THE WRIT

ILLINOIS' TWO-TIERED STANDARD TO EVALUATE COMPETENCY OF COUNSEL IS IN CONFLICT WITH THE UNITED STATES SUPREME COURT'S DECISION IN *CUYLER v. SULLIVAN*, 446 U.S. 335 (1980) THAT ONE STANDARD OF COMPETENCY BE APPLIED.

On May 12, 1980, this Court, in *Cuyler v. Sullivan*, 446 U.S. 335, held that drawing a distinction between retained and appointed counsel violates an individual's Sixth Amendment guarantee of adequate legal assistance. This Court's decision in *Cuyler* conflicts with Illinois' two-tiered standard applied in the instant case by the Appellate and Supreme Courts of Illinois. This two-tiered standard is articulated and in *People v. Greer* (1980), 79 Ill.2d 103, 402 N.E.2d 203, and in *People v. Murphy* (1978), 72 Ill.2d 421, 381 N.E.2d 677. Further, *People v. Murphy* was the authority relied upon by the Appellate Court in the instant case.

However, it must be noted that since *Cuyler v. Sullivan*, at least two districts of the Illinois Appellate Court have held that in light of *Cuyler*, the Illinois two-tiered standard is impermissible. *People v. Scott* (5th Dist. 1981), 94 Ill. App. 3d 159, 418 N.E.2d 805, and *People v. Talley* (1st Dist. 1981) 97 Ill. App. 3d 439, 422 N.E.2d 1084. The courts of Florida and Texas have similarly interpreted *Cuyler v. Sullivan*, See, e.g. *Battle v. State* (Fla. App. 1980), 388 So.2d 1323, 1324; *Hurley v. State* (Tex. CR. App. 1980), 606 S.W.2d 887, 889-90; see also, *Kemp v. Leggett* (5th Cir. 1981), 635 F.2d 453, 455.

Illinois employs a two-tiered standard to evaluate the competence of counsel. For "court-appointed" counsel, a constitutional deficiency will occur if counsel is actually incompetent as reflected in his performance as trial attorney and if the incompetence produces a substantial

prejudice without which the result would probably have been different. In the case of privately retained counsel, a reviewing court will not reverse unless the representation is of such low caliber as to amount to no representation at all or reduces the court proceedings to a farce or sham. This standard was specifically employed by the Appellate Court in the instant case and this standard has not yet been abandoned by the Illinois Supreme Court.

In *Cuyler v. Sullivan*, this Court stated:

> A proper respect for the Sixth Amendment disarms petitioner's contention that defendants who retain their own lawyers are entitled to less protection than defendants for whom the State appoints counsel. We may assume with confidence that most counsel, whether retained or appointed, will protect the rights of an accused. But experience teaches that, in some cases, retained counsel will not provide adequate representation. The vital guarantee of the Sixth Amendment would stand for little if the often uninformed decision to retain a particular lawyer could reduce or forfeit the defendant's entitlement to constitutional protection. Since the State's conduct of a criminal trial itself implicates the State in the defendant's conviction, we see no basis for drawing a distinction between retained and appointed counsel that would deny equal justice to defendants who must choose their own lawyers. 446 U.S., at pages 344-345.

The decision in *Cuyler* mandates a single and, therefore, equal standard to be applied by State reviewing courts on the question of adequate legal assistance. In effect, the attorney who is privately retained is held to a lower standard. In effect, the client of a privately retained counsel is not receiving equal justice before the reviewing courts. A two-tiered standard, which Illinois still utilizes, creates the anomaly of a non-indigent receiving less protection. This anomaly was recognized

by this Court in *Cuyler* when it cited the case of *United States ex rel. Hart v. Davenport*, 478 F.2d 203 (3rd Cir. 1978) in footnote #9. The *Davenport* case stated:

> A rule which would apply one fourteenth amendment test to assigned counsel and another to retained counsel would produce the anomaly that the non-indigent, who must retain an attorney if he can afford one, would be entitled to less protection . . . The effect upon the defendant-confinement as a result of an unfair state trial—is the same whether the inadequate attorney was assigned or retained. 446 U.S., at page 345.

The "sham" or "farce" standard applied by Illinois in reviewing the competency of privately retained counsel violates the Sixth Amendment Guarantee of effective assistance of counsel because the Illinois standard falls short of the constitutional standard of adequate legal assistance.

In the instant case, the trial counsel for the Petitioner failed to conduct a pre-trial investigation. Trial counsel failed to investigate the reputation of the prosecutrix for chastity. Trial counsel failed to interview and/or subpoena "Marsha", the woman who allegedly paid back $85.00 to the prosecutrix on the night of the incident. Trial counsel failed to interview and/or subpoena the mutual friends who had introduced the prosecutrix and the Petitioner on the night of the incident. Trial counsel failed to investigate and fully ascertain the registration and ownership of the gun seized. Concomitantly, although the record indicates that one of the arresting officers (Officer Ristenpart) was responsible for investigating the ownership of the gun, he was never called or subpoenaed as a witness. This omission is obviously inconsistent with the defense theory that the Petitioner denied ever owning or seeing the gun. Yet, trial counsel for Petitioner essentially stipulated to the admission of the gun.

Possibly most fatal to Petitioner's case was the handling of the pre-trial motion to quash the arrest and suppress evidence. As the trial court stated later, in finding the Petitioner guilty of both charges, the resolution of the gun issue was most important. Thus, the pre-trial hearing to quash and suppress was a most crucial stage. Yet, the *only* witness called by Petitioner's trial counsel was one of the arresting officers. With his testimony standing naked and un-rebutted, the result was *automatic*. Petitioner's testimony during the bench trial clearly conflicted with the officer's testimony on crucial issues. Yet, his testimony came too late. The failure to rebut or attempt to rebut the police officer's testimony substantially prejudiced Petitioner's chances at the later trial. Further, it appeared that at the time of the pre-trial hearing, the ownership of the gun remained open. Yet, the only testimony at the pre-trial hearing was that the gun was seized from the Petitioner's home. Petitioner's trial counsel did nothing to attack the ownership of the gun. He did not call the Petitioner. Upon learning that Officer Ristenpart was still investigating the ownership, he did not attempt to suspend this extremely crucial hearing. He never subpoenaed Officer Ristenpart. He never fully investigated this basic issue.

The record is clear that Petitioner's trial testimony, if utilized at the pre-trial hearing, was in sharp contrast to the Officer's testimony. The only evidence the trial judge had at the pre-trial hearing was the *direct* examination of the police officer by Petitioner's trial counsel and the cross-examination of the police officer by the prosecutor. Thus, the officer's testimony was un-rebutted and reinforced. The total failure of the defense to contest the issues at the pre-trial hearing irretrievably tainted and undermined Petitioner's case at trial. Trial counsel's repeated omissions constituted serious derelictions which substantially prejudiced the Petitioner to the extent that the outcome was probably affected.

Clearly, trial counsel had materially failed to competently defend his client. Trial counsel had failed to fulfill his established duty to conduct appropriate investigations and to develop his defense. Trial counsel's representation clearly falls below established standards for a criminal defense attorney. ABA Standards for Defense Function, Project on Standards for Criminal Justice, Part IV (App. Draft 1971). See, also, *Coles v. Peyton*, 389 F.2d 224, 226 (4th Cir. 1968), *cert. denied*, 393 U.S. 849. Beyond a doubt, trial counsel's failure to adequately and competently represent Petitioner created substantial prejudice without which the outcome would probably have been different.

CONCLUSION

For these reasons, we respectfully urge the Court to grant a Writ of Certiorari to review the judgment of the Court of Appeals of the State of Illinois and that this judgment be reversed.

Respectfully submitted,

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Of Counsel:
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Appendix

APPENDIX A

No. 79-2467

First Division
Filed March 23, 1981

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff-Appellee,

v.

STEPHEN L. MCMURTRY,

Defendant-Appellant.

Appeal from the Circuit Court of Cook County.
Honorable **Dwight McKay**, *Judge Presiding.*

ORDER DISPOSING OF APPEAL UNDER SUPREME COURT RULE 23

Following a bench trial defendant was convicted of rape and armed robbery (Ill. Rev. Stat. 1977, ch. 38, pars. 11-1 and 18-2) and sentenced to a term of 6 years. Defendant contends on appeal that his retained trial counsel was ineffective; that he was not proved guilty beyond a reasonable doubt; and that his motion for substitution of judges was improperly denied.

Prior to trial defense counsel filed a standard motion for discovery, answered the State's discovery request and filed a motion to quash defendant's arrest and suppress evidence. At the hearing on the motion defense counsel questioned the arresting officer to determine if

he acted properly in arresting defendant and searching his bedroom dresser. The motion was denied.

At trial the 24-year-old victim testified that she met defendant through a mutual acquaintance about midnight outside a lounge on June 27, 1977. Eventually, she acceded to his request to give her a ride, and they stopped at his house before he was supposed to take her to the home of her girlfriend. There she had a soda and waited while defendant had a drink and spoke on the telephone. After the telephone conversation, defendant made several sexually suggestive remarks to the victim who rebuffed his efforts. Defendant then grabbed the victim and pulled her down the hallway to his bedroom. There defendant reached into a dresser drawer, drew out an automatic pistol and began to speak in an odd, threatening manner before ordering her to disrobe at gunpoint and then raping her. When the victim refused to perform an act of fellatio, defendant ordered her to leave. As she was putting her clothes on, defendant removed $105 from her purse. When she demanded her property back, defendant hit her near her left eye with his fist. She then fled to a nearby house, and the residents called police.

There was a stipulation concerning the testimony given by Officer Newton during defendant's motion to suppress. Officer Newton had testified that he interviewed the victim shortly after the incident and noted that she had a disheveled appearance and was crying; he also saw there was a swelling and some discoloration starting to appear around her left eye. After receiving her complaint of rape and armed robbery, the officer went to defendant's house. The officer was admitted, and with defendant's consent to search the premises he went directly to the bedroom dresser where he recovered an automatic pistol as the victim had indicated.

Defendant testified that he was steadily employed. On the night in question he met a friend who said that he was with the victim and another woman; the victim expressed a desire to meet defendant. The victim asked defendant for a ride in his car and told him that she was

looking for a place to stay. They went to his home where he gave her a soft drink, and they began to talk and listen to his stereo. Later while he spoke to his brother on the telephone for about one hour, she watched television in his bedroom. The victim then went to "freshen up," and she came out of the bathroom wearing only the robe he had given to her. She then lay on his bed, and defendant had consensual intercourse with her. Thereafter the victim made coffee for defendant and explained that he would have to pay her for her "services." When defendant refused to pay, she called him a "cheap bastard" and said he was going to be in trouble. The victim then tried to hit him with a lamp, but he grabbed it from her which resulted in her accusing him of hitting her on the face with the lamp. Defendant saw a bruise below her left eye before she left. Shortly thereafter the police arrived, and, even though he did not consent, they searched his house where they recovered a gun from the bedroom cabinet. Defendant denied knowing how the gun got there, but he claimed the cabinet was in the room where the victim undressed.

In resolving the determination of guilt the court noted the conflict between the testimony of the victim and defendant. The court said that the victim's testimony was clear and convincing while aspects of defendant's version were incredible.

Defendant contends that he was denied effective assistance of retained counsel. Defendant predicates his argument on counsel's failure to call him to testify at the hearing on the motion to suppress at which Officer Newton testified that defendant gave his consent to search his house resulting in recovery of the handgun. Defendant, who claimed at trial that he did not consent, now asserts that he had testified at the hearing the court may have found that he did not consent thereby suppressing a crucial element of evidence.

The test of incompetency of retained counsel is whether from the totality of the proceedings his conduct amounts to no representation at all or reduces the proceedings to a sham or farce. (*People v. Murphy*

(1978), 72 Ill. 2d 421, 436, 381 N.E.2d 677.) As stated in *Murphy*, defense "[c]ounsel's judgment in not introducing more evidence [at a hearing on a motion to suppress defendant's confessions] may have been in error. But errors in judgment or trial strategy do not establish incompetence." (72 Ill. 2d at 437.) Our examination of the entire record in the present case shows that defendant received competent representation.

Defendant further claims that he was not proved guilty beyond a reasonable doubt mainly because it was unlikely that he would rape and rob the victim in his own home and then consent to a search of his house by police. The evidence was conflicting, and the assessment of the witnesses' credibility was made by the court. We do not believe that evaluation was improper. (*People v. Akis* (1976), 63 Ill. 2d 296, 298-99, 347 N.E.2d 733.) Nor can we say that the record presents a reasonable doubt of defendant's guilt. Compare *People v. Secret* (1978), 72 Ill. 2d 371, 381 N.E.2d 285.

Defendant's final contention is raised for the first time in his reply brief. He argues that his motion for a substitution of trial judges was erroneously denied. Defendant did not raise this issue in his written post-trial motion thus waiving the issue. (*People v. Pickett* (1973), 54 Ill. 2d 280, 282, 296 N.E.2d 856.) Further, the matter is not properly before us since it was first raised in defendant's reply brief. 73 Ill. 2d R. 341(e)(7).

The judgment of the circuit court is affirmed.

Dated at Chicago, Illinois, this 23rd day of March, 1981.

ENTER:

/s/ John M. O'Connor, Jr.
Justice

/s/ Thomas A. McGloon
Justice

/s/ Calvin C. Campbell
Justice

APPENDIX B

ILLINOIS SUPREME COURT
CLELL L. WOODS, CLERK
Supreme Court Building
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(217) 782-2035

October 19, 1981

Mr. Philip J. Rock
Attorney at Law
29 S. LaSalle St., S#830
Chicago, IL 60603

No. 54989—People State of Illinois, respondent, vs. Stephen L. McMurtry, petitioner. Leave to appeal, Appellate Court, First District.

The Supreme Court today denied the petition for leave to appeal in the above entitled cause.

Very truly yours,
/s/ Clell L. Woods
Clerk of the Supreme Court

Supplemental Brief

Office - Supreme Court, U.S.
FILED
MAR 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1308

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

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Petitioner,

vs.

STATE OF ILLINOIS,

Respondent.

SUPPLEMENT TO PETITION FOR WRIT OF CERTIORARI

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In The

Supreme Court of the United States

October Term, 1981

STEPHEN L. McMURTRY,

Petitioner,

vs.

STATE OF ILLINOIS,

Respondent.

SUPPLEMENT TO PETITION FOR WRIT OF CERTIORARI

To the Honorable Justices of the Supreme Court of the United States:

Pursuant to Rule 22.6 of the Rules of the Supreme Court of the United States, Petitioner submits a short supplemental brief in support of his Petition for Writ of Certiorari now pending before this Court.

Petitioner requests that this Court consider the authority of the case of *People of the State of Illinois v. Richard Corder*, ... Ill. App. 3d ..... (1982) (3rd Dist. No. 81-252, 1/26/82) (Appendix)

The case of *People of the State of Illinois v. Richard Corder* represents an additional Illinois Appellate Court district which holds that in light of the authority of

Cuyler v. Sullivan, 446 U.S. 335 (1980) Illinois' current two-tiered standard to evaluate competency of counsel is violative of the Sixth Amendment to the Federal Constitution.

The case of *People v. Corder* utilizes as authority and supplements the Fifth and First Illinois Appellate Court districts' holdings in *People v. Scott*, 94 Ill. App. 3d 159, 418 N.E. 2d 805 (1981) and *People v. Talley*, 97 Ill. App. 3d 439, 422 N.E. 2d 1984 (1981), respectively. (See page 10 of Petition for Writ of Certiorari)

As of this writing, three of the five Illinois Appellate Court districts have held that, in light of *Cuyler v. Sullivan*, the Illinois standard which was utilized in the instant case violates fundamental federal constitutional guarantees.

Further, counsel for Petitioner is unaware of any Illinois Appellate Court districts which have announced holdings contrary to the decisions in *People v. Corder*, *People v. Scott*, and *People v. Talley*.

WHEREFORE, Petitioner prays this Honorable Court to take notice of the supplemental authority of the case of *People v. Corder* in support of his Petition for Writ of Certiorari.

Respectfully submitted,

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Of Counsel:
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Appendix

APPENDIX

STATE OF ILLINOIS
APPELLATE COURT THIRD DISTRICT
OTTAWA

81-252

At a term of the Appellate Court, begun and held at Ottawa, on the 1st Day of January in the year of our Lord one thousand nine hundred and eighty-one, within and for the Third District of Illinois:

Present—

HONORABLE ALBERT SCOTT, Presiding Justice	X
HONORABLE TOBIAS BARRY, Justice	X
HONORABLE ALLAN L. STOUDER, Justice	X
HONORABLE JAY J. ALLOY, Justice	
HONORABLE JAMES D. HEIPLE, Justice	
JOSEPH FENNESSEY, Clerk	

BE IT REMEMBERED, that afterwards on January 26, 1982 the Opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following viz:

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT
A.D. 1981

Case No. 81-252

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the Tenth Judicial Circuit, Peoria County, Illinois.
Plaintiff-Appellee,	)	
vs.	)	
RICHARD CORDER,	)	Honorable Richard E. Eagleton Presiding Judge
Defendant-Appellant.	)	

Mr. JUSTICE STOUDER delivered the opinion of the court:

Defendant Richard Corder was convicted of unlawful delivery of a substance represented to be a controlled substance and sentenced to a five-year term of imprisonment. After filing a notice of appeal, defendant moved to dismiss his appeal and filed a *pro se* petition for post-conviction relief. Counsel was appointed and after an evidentiary hearing on an amended petition, the circuit court of Peoria County denied post-conviction relief.

On January 4, 1979, defendant was indicted for the subject crime, and a public defender was appointed to represent him. That appointment was withdrawn on February 13, 1979, when a privately-retained attorney appeared for defendant. Trial was set for March 5, 1979, but the attorney requested and received a continuance for the purpose of further investigation. On March 19, 1979, counsel again requested a continuance pending the disposition of another proceeding. This the court denied and the cause proceeded to trial.

The State's evidence implicating defendant in the crime consisted of the testimony of Officer James Williams, an occurrence witness. Officer Williams testied that on June 21, 1978, he was working in an undercover capacity in the area of the El Dorado Club. At approximately 1 a.m., the witness met a black male who was introduced to him as Richard Corder. The officer had never met or seen this person before, but at trial identified defendant as that individual and further testified that defendant sold him a substance represented to be heroin. Officer Williams indicated that the transaction occurred while he was in the front seat, and defendant was in the rear seat, of a station wagon. The vehicle was parked approximately 75 feet from the nearest street light, and the interior lights were off, but the officer could clearly see that the criminal was clean shaven.

Defendant's evidence was designed to demonstrate that he was not the person who delivered the substance to Officer Williams. The crux of his defense was that, for the last six or seven years, he had continually worn a beard. William Bauer testified to this fact, but had not seen defendant between March, 1978 and August, 1978. Defendant also testified to the fact, but for the relevant period of time, his testimony was completely uncorroborated. At defendant's post-trial hearing, however, his attorney attempted to introduce corroborating evidence. Defendant's driver's license, issued six days after the crime, clearly bore the photograph of a bearded man, but had not been introduced into evidence during the trial. As defense counsel did not allege that the license was not available or unknown at the time of trial, this evidence was not considered by the court.

In his amended petition for post-conviction relief, defendant alleged that his trial counsel was incompetent, ineffective, and frequently intoxicated. While a number of specific inadequacies were noted, the gravamen of the petition was the failure to corroborate defendant's testimony regarding his beard. It was defendant's burden to prove this allegation and the determination of the trial court must be upheld unless mani-

festly erroneous. *People v. Bracey* (1972), 51 Ill.2d 514, 282 N.E.2d 685.

At his evidentiary hearing, defendant produced both witnesses and affidavits from potential witnesses who indicated that they could corroborate his testimony concerning his beard. Bruno Scordo, the owner of the night club outside of which the drug transaction took place, testified that he had never seen defendant clean shaven, and that defendant had a beard of one to one-half inches on June 21, 1978. Cathy Taylor testified that she saw defendant almost every day in June, 1978, and he always wore a beard approximately one-inch long. Frankie Jacobs, defendant's sister, testified that defendant had always worn a beard and had one on June 21, 1978. These witnesses, Robert Drucker and Ernest Washington, all alleged that they were able to testify at trial that defendant had a beard on June 21, 1978, or thereabouts, but they were not contacted by defendant's attorney.

Defendant testified that he gave his lawyer a list of witnesses, with addresses, three weeks before trial. The witnesses included, among others, Dick Brewer, Bill Bush, Robert Drucker, Frankie Jacobs, Bruno Scordo, and Ernest Washington. Four weeks before trial, defendant had informed his attorney about his driver's license. Trial counsel testified that defendant informed him of several witnesses a week or two before trial, but he could not recall their names or number. He indicated that defendant provided their telephone numbers, and that he personally attempted to telephone some of the witnesses, but was unsuccessful in reaching them. The attorney stated that he "got the word out" to his contacts in the black community, had his secretary place some calls, and had Prince Chandler, who at the time ran an establishment called the Psychedelic, attempt to contact the witnesses. Counsel did not know whether Chandler ever contacted anyone.

This was the extent of defense counsel's effort to contact witnesses. He explained that he felt the witnesses

were being uncooperative and found his attempts to contact them a "very frustrating experience." When asked if he therefore was forced to subpoena the witnesses, he replied that did not know as he had disposed of defendant's file sometime after the trial. The reality of the matter is that he did not subpoena any witnesses nor seek a subpoena *duces tecum* for the driver's license.

While not a factor in our decision today, extensive evidence was presented concerning the existence of a serious drinking problem on the part of the attorney. The problem was expressly acknowledged by the trial court.

A defendant is entitled to the assistance of counsel under both the United States Constitution and the Illinois Constitution of 1970. Counsel can, however, be so incompetent as to undermine that right and deprive a defendant of his due process right to a fair trial (*People v. Murphy* (1978), 72 Ill.2d 421, 381 N.E.2d 677.) While the courts of this state have traditionally employed a two-tiered standard to determine the competence of counsel, holding an appointed attorney to a more rigorous standard than a privately-retained attorney (compare *People v. Greer* (1980), 79 Ill.2d 103, 402 N.E.2d 203 *with People v. Murphy*), such a distinction has been questioned by the Supreme Court:

> "A proper respect for the Sixth Amendment disarms petitioner's contention that defendants who retain their own lawyers are entitled to less protection than defendants for whom the State appoints counsel. *** [W]e see no reason for drawing a distinction ***" *Cuyler v. Sullivan* (1980), 446 U.S. 335, 344-45, 100 S.Ct. 1708, 1716-17, 64 L.Ed.2d 333, ...

The State accurately indicates that *Cuyler* does not state that the standard for retained counsel must rise to that for appointed counsel, but we find this the better view and supported by precedent. (*See People v. Talley* (1981), 97 Ill. App.3d 439, ..., 422 N.E.2d 1084, 1088; (*People v. Scott* (1981), 94 Ill. App.3d 159, ..., 418 N.E.2d 805,

808.) Therefore the inadequacy of a defendant's trial counsel entitled him to a new trial if counsel was actually incompetent, as reflected in the performance of his duties as trial attorney, and if this incompetence produced substantial prejudice to the defendant without which the result of the trial would probably have been different. *People v. Greer.*

In the case at bar, defendant was convicted on the strength of the identification testimony of one undercover officer, who did not effect an arrest at the time of the crime. The officer unequivocally stated that the criminal was clean shaven. Although aware of this from pre-trial discovery, defense counsel introduced no evidence at trial to corroborate defendant's testimony that he wore a beard before, during, and after the time of the crime. This was the case in spite of the fact counsel was aware of defendant's driver's license showing the presence of a beard six days after the commission of the offense, and that he had received a list of potential witnesses. None of the witnesses were interviewed. Neither the license nor a single witness was subpoenaed. When the attorney requested another continuance at the time of trial, he did not state that there was any problem securing or producing any needed evidence.

The failure to interview witnesses may indicate actual incompetence, particularly when the witnesses are known to trial counsel and their testimony may be exonerating. (*People v. Greer* (1980), 79 Ill.2d 103, 402 N.E.2d 203.) This case presents a situation where not only this mode of incompetence was evidenced, but witnesses and evidence were not subpoenaed. The only attempt to introduce corroborating evidence came after trial, when defense counsel attempted to introduce the license at the post-trial hearing. Yet even this attempt was thwarted by the attorney's failure to allege that the evidence was not available or known to him at the time of trial. Under the circumstances presented in this case, we find trial counsel was actually incompetent and this incompetence produced substantial prejudice to defend-

ant, without which the outcome of his trial would probably have been different.

Accordingly, the order of the circuit court of Peoria County denying the petition for post-conviction relief is reversed and this cause remanded for a new trial.

Reversed and remanded.

BARRY, J. and SCOTT, P.J., concur.

Opposition

Supreme Court, U.S.
FILED
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CLERK

No. 81-1308

In the Supreme Court of the United States

OCTOBER TERM, 1981

STEPHEN L. MCMURTRY,
Petitioner,

vs.

STATE OF ILLINOIS,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST JUDICIAL DISTRICT

BRIEF FOR RESPONDENT IN OPPOSITION

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Printed by the Authority of the State of Illinois — 4/3/82

QUESTION PRESENTED

Whether petitioner's claim that Illinois' "two-tiered" standard to evaluate competency of trial counsel violates the Sixth Amendment guarantee of effective counsel is worthy of review by this Court.

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No. 81-1308

In the Supreme Court of the United States

OCTOBER TERM, 1981

STEPHEN L. MCMURTRY,
Petitioner,

vs.

STATE OF ILLINOIS,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST JUDICIAL DISTRICT

BRIEF FOR RESPONDENT IN OPPOSITION

The respondent asks this court to deny the petition for Writ of Certiorari to review the judgment of the Appellate Court of Illinois insofar as petitioner fails to satisfy the jurisdictional requirements established by 28 U.S.C. § 1257 and does not raise a significant question of constitutional proportion that is worthy of review.

OPINION BELOW

The Illinois Appellate Court opinion is appended to petitioners' brief.

JURISDICTION

As treated more fully in the argument portion of this Brief in Opposition, the petitioner has failed to satisfy the prerequisites to jurisdiction established by 28 U.S.C. § 1257.

STATEMENT OF THE CASE

Because the respondent takes exception to the argumentative and, at times, misleading recitation of the facts found in petitioner's brief, this Court is referred to the Illinois Appellate Court opinion in this case for a more neutral factual narration. *See People v. McMurtry,* No. 79-2467 (1st Dist. 1981), which is reprinted as Appendix A in the Petition for Writ of Certiorari.

REASONS FOR DENYING THE WRIT

I.

THE PETITIONER SHOULD BE PRECLUDED FROM RAISING A CHALLENGE TO THE ILLINOIS STANDARD FOR EFFECTIVE ASSISTANCE OF TRIAL COUNSEL WHERE THE ISSUE WAS NOT PRESENTED IN THE STATE COURTS.

The petitioner asks the Court to declare that the Illinois standard for evaluating competency of trial counsel is violative of the Sixth Amendment guarantee of effective assistance of counsel as articulated by this Court in *Cuyler v. Sullivan,* 446 U.S. 335 (1980). He grounds this argument on the contention that Illinois maintains a two-tiered approach to evaluation of counsel's assistance based on whether counsel was retained or appointed. He contends that the ef-

fectiveness of his retained counsel was considered under a harsh "farce or sham" standard while the effectiveness of appointed counsel in Illinois is evaluated under a lesser "actual incompetence resulting in substantial prejudice" test.

The petitioner did not raise this theory before the Appellate Court of Illinois or the Illinois Supreme Court.[1]

Because the theory raised in this petition was never presented to, nor passed upon by, any state court to render a judgment in this case, this Court should deny the petition for "want of jurisdiction". *Cardinale v. Louisiana,* 394 U.S. 437, 439 (1969); *Tacon v. Arizona,* 410 U.S. 351 (1973) (*per curiam*) (writ dismissed as improvidently granted); 28 U.S.C. § 1257(3).

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[1] Petitioner represents in the Petition for a Writ of Certiorari that the Petition for Leave to Appeal to the Illinois Supreme Court attacked "the Illinois two-tiered standard for review of incompetency of counsel." Petition at p. 9. The Petition for Leave to Appeal does challenge the "farce or sham test" and the "no representation at all" test. Petition for Leave to Appeal at p. 8. However, "farce and sham" and "no representation at all" are merely descriptive terms used to identify the same test. No fair reading of the Petition for Leave to Appeal could possibly lead this Honorable Court to conclude that the petitioner has presented the two-tiered approach argument to the Illinois Supreme Court.

II.

THE ILLINOIS COURTS APPLY THE SAME STANDARD TO DETERMINE EFFECTIVE ASSISTANCE OF TRIAL COUNSEL WHETHER COUNSEL IS PRIVATELY RETAINED OR COURT-APPOINTED.

Petitioner contends that under Illinois law, a harsher standard is used to review claims of incompetency of retained counsel versus claims of incompetency of appointed counsel. Petitioner further argues that the Illinois Appellate Court applied the harsher standard in reviewing his claim of incompetency of retained trial counsel in violation of his rights under the Sixth and Fourteenth Amendments. This Court must reject petitioner's claim as the test applied by the Illinois courts for evaluating incompetency of counsel claims is the same for both retained and appointed counsel.

Respondents admit that when reviewing ineffective assistance of counsel claims, Illinois courts previously distinguished between cases involving court-appointed and privately retained counsel. *See People v. Morris,* 3 Ill.2d 437, 121 N.E.2d 810 (1954). Under *Morris,* a defendant who selected his own counsel could not attack the failure of such counsel to exercise care and skill in the trial of the case as a basis for reversing a judgment of conviction. 3 Ill.2d at 444-445, 121 N.E.2d at 815. However, a defendant who was represented by court-appointed counsel could attack the adequacy of that representation and obtain a reversal if he could establish:

> (1) actual incompetency of counsel, as reflected by the manner of carrying out his duties as a trial attorney; and (2) substantial prejudice resulting

> therefrom, without which the outcome would probably have been different.

3 Ill.2d at 444, 121 N.E.2d at 817.

Subsequent Illinois Supreme Court decisions expanded the right to adequate assistance of counsel so that the actions of retained trial counsel could be attacked in the appellate process.

> . . .[W]here representation by counsel of defendant's choice is of such low calibre as to amount to no representation at all or reduces the court proceedings to a farce and sham, defendant is denied the fair trial contemplated by the due process guarantees of the Federal and State Constitutions.

People v. Somerville, 42 Ill.2d 1, 5, 245 N.E.2d 461, 464 (1969) (citations omitted); *See also People v. Nelson,* 42 Ill.2d 172, 175, 246 N.E.2d 244, 246 (1969).

Following this precedent, Illinois courts have flatly rejected the argument that the standards for evaluating the representation afforded by appointed counsel differ from those used in valuating the representation afforded by retained counsel. *People v. Dean*, 31 Ill. 2d 214, 201 N.E.2d 405 (1964); *People v. Bliss*, 44 Ill. 2d 363, 255 N.E.2d 405 (1970); *People v. Long*, 12 Ill. App. 3d 974, 298 N.E.2d 784 (4th Dist. 1973); *People v. Edmonds,* 79 Ill. App. 3d 33, 398 N.E.2d 230 (1st Dist. 1979); *People v. Shestiuk,* 59 Ill. App. 3d 296, 376 N.E.2d 56 (1st Dist. 1978); *People v. Virgil,* 54 Ill. App. 3d 682, 370 N.E.2d 74 (1st Dist. 1977); *People v. Hawkins,* 23 Ill. App. 3d 758, 320 N.E.2d 90 (1st Dist. 1974); *People v. Ortiz*, 22 Ill. App. 3d 788, 317 N.E.2d 763 (1st Dist. 1974). In each of the above cases the Court noted that there was no substantive difference between the test to be applied for appointed counsel and the farce or sham standard applied to retained counsel. An identical analysis would effect release in either situation. (See also *People v. Puckett,* 70 Ill. App. 3d 743, 388 N.E.2d 1293 (4th Dist.

1979); *People v. Elliot,* 46 Ill. App. 3d 887, 361 N.E.2d 852 (4th Dist. 1977), *cert. denied,* 435 U.S. 473 (1978)).[2] Whether counsel is retained or appointed, the defendant will gain his release if he can establish: (1) actual incompetence of counsel, as reflected by the manner of carrying out his duties as a trial attorney; and (2) substantial prejudice resulting therefrom, without which the outcome would probably have been different. *People v. Greer,* 79 Ill.2d 103, 120-121, 402 N.E.2d 203, 211 (1980) (appointed counsel); *People v. Goerger,* 52 Ill. 2d 403, 409, 288 N.E.2d 416, 419 (1972) (appointed counsel); *Virgil,* 54 Ill. App. 3d at 687, 370 N.E.2d at 77-78 (retained counsel); See *People v. Wade,* 71 Ill. App. 3d 1013, 1019-1020, 389 N.E.2d 1230, 1236 (1st Dist. 1979) (retained counsel).

Courts in Illinois have, admittedly, engaged in the past in a ceremony of semantics in approaching ineffective assistance of counsel claims. However, as the cases above clearly demonstrate, the analysis underlying the "two" approaches has been, *and is now,* the same. Any decision by this Court directed to the differences in terms used to describe this consistent analysis as it is applied to different situations will not affect the analysis itself. This Court should not, therefore, invest its valuable time and resources to address this question which will not, ultimately, alter the state of the law in Illinois.

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[2] *Puckett* and *Elliot* both involved claims of ineffective assistance of court-appointed attorneys, with the reviewing court applying the "farce or mockery" standard in their determination.

III.

REVIEW OF PETITIONER'S CLAIM WOULD AMOUNT TO AN UNWARRANTED INTRUSION ON THE TIME AND RESOURCES OF THIS COURT WHERE PETITIONER'S POSITION WILL NOT BE ALTERED BY ANY DECISION OF THIS COURT.

Petitioner's claim of ineffective assistance of trial counsel is based on alleged errors in judgment or trial strategy on the part of his trial counsel. (See Petition for Writ of Certiorari, p. 12). The Illinois Appellate Court, in dismissing petitioner's appeal, found as a matter of fact that these claims were addressed to trial strategy (See Petition for Writ of Certiorari Appendix, p. 4a).

The courts in Illinois have consistently held that a review of trial counsel's competency does not extend to areas involving the exercise of judgment, discretion or trial strategy. Such is the case whether counsel is appointed (*People v. Gill,* 54 Ill.2d, 357, 297 N.E.2d 135 (1973), *cert. denied,* 414 U.S. 1144 (1974); *People v. Newell,* 48 Ill.2d 382, 268 N.E.2d 17 (1971); *People v. Hines,* 34 Ill. App. 3d 97, 339 N.E.2d 489 (1st Dist. 1975); *People v. Williams,* 27 Ill. App. 3d 858, 327 N.E. 2d 461 (3rd Dist. 1975)) or privately retained. *People v. Murphy,* 72 Ill.2d 421, 381 N.E.2d 677 (1978); *People v. Torres,* 54 Ill.2d 384, 297 N.E.2d 142 (1973); *People v. Shestiuk,* 59 Ill. App. 3d 296, 276 N.E.2d 56 (1st Dist. 1978).

The United States Court of Appeals for the Seventh Circuit has held that to prevail on a claim of ineffective assistance of counsel, a habeas corpus petitioner must show that his attorney failed to meet a minimum standard of professional representation. *Guzzardo v. Bengston,* 643 F.2d 1300 (7th Cir. 1981); *United States ex rel. Cyburt v. Rowe,* 638 F.2d 1100 (7th

Cir. 1981); *United States ex rel. Williams v. Twomey,* 510 F.2d 634 (7th Cir.), *cert denied,* 423 U.S. 876 (1975). Furthermore, alleged errors of omission or commission by trial counsel that relate to trial strategy or tactics and involve elements of discretion and judgment on which skilled and experienced advocates might honestly disagree do not rise to the level of a Sixth Amendment violation. *Guzzardo,* 643 F.2d at 1305; *United States ex rel. Robinson v. Pate,* 312 F.2d 161 (7th Cir.) *cert. denied,* 373 U.S. 943 (1963); *United States ex rel. Schultz v. Twomey,* 404 F. Supp. 1300 (N.D. Ill. 1975).

Petitioner here claims that the imposition of a harsher standard of review of his trial counsel's representation resulted in a denial of his Sixth and Fourteenth Amendment rights. The above demonstrates that regardless of the label placed on the standard or the particular court petitioned, alleged errors of trial strategy or tactics do not give rise to a valid ineffective assistance of counsel claim. Therefore, any decision by this Court on the merits of petitioner's claim could in no way affect his lot.

CONCLUSION

For these reasons, the People of the State of Illinois ask this court to deny the petition for writ of certiorari.

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April 3, 1982.

Appendix

No. _____

IN THE SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, *Plaintiff-Appellee,*	)	Appeal from the Circuit Court of Cook County
-vs-	)	
STEPHEN L. McMUTRY, *Defendant-Appellant.*	)	Honorable Dwight McKay, Judge Presiding.

PETITION FOR LEAVE TO APPEAL

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Oral Argument Request

No. _____

IN THE SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, *Plaintiff-Appellee,*	Appeal from the Circuit Court of Cook County
-vs-	
STEPHEN L. McMUTRY, *Defendant-Appellant.*	Honorable Dwight McKay, Judge Presiding.

PETITION FOR LEAVE TO APPEAL

MAY IT PLEASE THE COURT:

PRAYER

The Defendant, STEPHEN L. McMUTRY, respectfully prays that the Honorable Court, grant this Petition for Leave to Appeal from the judgment of the Appellate Court, First District.

DATE OF JUDGMENT

The judgment of the Appellate Court was entered on March 23, 1981. A Petition for Rehearing was filed. The Petition was denied April 22, 1981.

POINTS RELIED UPON FOR REVERSAL

I.

THE DENIAL OF DEFENDANT'S MOTION FOR SUBSTITUTION WAS ERROR AND DEPRIVED DEFENDANT OF HIS DUE PROCESS RIGHT OF A FAIR AND IMPARTIAL TRIAL

People v. Kostos, 21 Ill. 2d 451 (1961);

People v. Smith, 28 Ill. 2d 445 (1963);

People v. Thomas, 58 Ill. App. 3d 460 (1978);

People v. Flowers, 47 Ill. App. 3d 809 (1977);

People v. Ehrler, 114 Ill. App. 2d 171 (1969);

People v. Gregory, 16 Ill. App. 2d 576 (1958); and Fifth Amendment to the Constitution of the United States

II.

THE REPRESENTATION AFFORDED DEFENDANT DID NOT SATISFY THE CONSTITUTIONAL REQUIREMENT OF ASSISTANCE OF COUNSEL

People v. Murphy, 72 Ill. 2s 421 (1978); special concurring opinion of J. Clark;

United States ex rel. Williams v. Twomey, (7th Cir. 1975), 510 F. 2d 634, *cert. denied sub nom. Sielaff v. Williams,* (1975), 423 U.S. 876; and

People v. Knippenberg, 66 Ill. 2d 276

III.

THE EVIDENCE IS SO UNREASONABLE, IMPROBABLE AND UNSATISFACTORY THAT IT RAISES REASONABLE DOUBTS OF THE DEFENDANT'S GUILT

People v. McKinzie, 18 Ill. 2s 44 (1960);

People v. Harper, 49 Ill. App. 3d 407 (1977);

People v. Foster, 56 Ill. App. 3d 22 (1978);

People v. Droskiewcz, 64 Ill. App. 3d (1978); and

People v. Withers, 69 Ill. App. 3d 568 (1979).

STATEMENT OF FACTS

The facts are to a great extent contained in the opinion of the Appellate Court. However, a short statement of facts concerning the substitution of judges is provided.

The first time the defendant appeared before Judge McKay was April 2, 1979. It was during defendant's first appearance before Judge McKay that he first perceived possible prejudice. This perception became the basis for a motion of substitution of judges conducted April 9, 1979. (R. C35-37)

Defendant's petition states that he believed he would not get a fair and impartial trial before the Honorable Dwight McKay. Further, defendant stated that he first perceived this prejudice on April 2, 1979, in his first appearance before Judge McKay. Defendant respectfully requested that his case be re-assigned.

On the same day, April 9, 1979, defendant's cause was re-assigned to Judge Samuels. Judge Samuels denied defendant's motion holding that the defendant had not timely filed his petition. (R. C1)

Defendant first appeared before Judge McKay on April 2, 1979. Defendant's bases for his motion for substitution arose out of his experience during his first appearance before Judge McKay on April 2, 1979.

ARGUMENT

I.

THE DENIAL OF DEFENDANT'S MOTION FOR SUBSTITUTION WAS ERROR AND DEPRIVED DEFENDANT OF HIS DUE PROCESS RIGHT OF A FAIR AND IMPARTIAL TRIAL

The record reflects that the defendant first had knowledge that his case would be tried by Judge McKay during defendant's first appearance on April 2, 1979. (R. C1) Concomitantly, the defendant first perceived that he would not

get a fair and impartial trial on April 2, 1979. This is established in defendant's petition. (R.C 36-37) Pursuant to this knowledge, defendant, at the *earliest practical moment,* moved to continue the matter until April 9, 1979, in order to present his petition. On April 3, 1979, counsel for defendant mailed a copy of his notice of motion and a copy of his petition. (R.C 35)

On April 9, 1979, seven (7) days from his first appearance before Judge McKay, defendant filed his petition requesting that his cause be reassigned from Judge McKay. Defendant's petition was ultimately denied as being untimely.

The record reflects that defendant's petition came before the trial judge had ruled on any substantial issues. In fact, the notice of motion and petition was mailed one day after defendant's first appearance before Judge McKay. Clearly, counsel acted promptly and with due diligence in this matter. *People v. Kostos,* 21 Ill. 2d 451, 454 (1961) Further, defendant's petition was not initiated for the purpose of delay or that the petition was an attempt to avoid any trial of the cause. *People v. Smith,* 28 Ill. 2d 445, 448 (1963) On the contrary, defendant had made two earlier demands for trial on September 12, 1978, and November 27, 1978. (R.C 32, 34)

Defendant petitioned for a substitution at the earliest practical moment. *People v. Gregory,* 16 Ill. App. 2d 576, 581 (1958); *People v. Ehrler,* 114 Ill. App. 2d 171 (1969)

Defendant's petition states that he first learned of Judge McKay's prejudice on April 2, 1979. The half-sheet in the record reflects that this date was defendant's first appearance before Judge McKay. (R.C 1) Section 114-5 of Chapter 38 should be given a liberal interpretation so as to *permit* rather than prevent substitution. *People v. Kostos,* 21 Ill. 2d 451, 454 (1961); *People v. Smith,* 28 Ill. 2d 445, 447 (1963); *People v. Flowers,* 47 Ill. App. 3d 809, 811 (1977); and *People v. Thomas,*

58 Ill. App. 3d 460 (1978). It is clear that defendant's petition brought on April 9, 1979, was timely filed when it was brought within ten (10) days of the date of the defendant could be charged with the knowledge of the assignment, namely, April 2, 1979. *People v. Ehrler,* 114 Ill. App. 2d 171, 177 (1969); *People v. Thomas,* 58 Ill. App. 3d 460 (1978)

Similarly, the denial of defendant's petition ignored the realities of defendant's situation and thus the denial had the effect of strictly construing the statute against the defendant. *People v. Flowers,* 47 Ill. App. 3d 809, 811 (1977) The record reflects that the denial of the substitution was against the intent of the statutory provision. Clearly, the statute was not liberally construed. Such a liberal interpretation of the statutory provision is required to protect the guarantee of a fair and impartial trial that is implicit in our legal system. *People v. Flowers,* 47 Ill. App. 3d 809 (1977)

Based upon the record and based upon a required liberal interpretation of §114(5) of Chapter 38 of the Illinois Revised Statutes, a finding should have been made that the defendant's petition was timely. A timely application requires "automatic" or "mandatory" substitution. *People v. Flowers,* 47 Ill. App. 3d 809 (1977); and *People v. Thomas,* 58 Ili. App. 460 (1978)

The defendant has been accused of two serious felonies. The defendant, not for purposes of delay, honestly petitioned the court for a substitution. This petition was brought to the attention of the court at the earliest practical moment. Justice demanded then and demands now that the defendant receive a fair and impartial trial. This is a guarantee. There should be a finding that his application was timely, that his cause should have been re-assigned, and that plain error was committed. Consequently, all the proceedings subsequent to the improper denial of the petition for substitution to substitute judges are

void and defendant's conviction be reversed and remanded for a new trial.

II.

THE REPRESENTATION AFFORDED DEFENDANT DID NOT SATISFY THE CONSTITUTIONAL REQUIREMENT OF ASSISTANCE OF COUNSEL

The Sixth Amendment to the Constitution of the United States provides in part:

> In all criminal prosecutions, the accused shall enjoy the right. . . . to have the Assistance of Counsel for his defense.

The Illinois Supreme Court has held that this Sixth Amendment right guarantees the defendant *effective* assistance of counsel. This right is applicable to state criminal proceedings via the Fourteenth Amendment. *People v. Knippenberg,* 66 Ill. 2d 276 (1977).

In the instant case, defense counsel filed a Motion to Quash Arrest and Suppress Evidence. (R.C 39-41) The sole question presented was whether the evidence seized and used against the defendant at trial was the product of an unconstitutional search. The trial court felt that this evidence was the most important issue in the proceeding. (R. 232) The court thus felt that it was determinative of guilt or innocence.

However, the only witness examined on defendant's motion to quash and suppress was the arresting officer, William Newton. (R. 4) This was patently insufficient and prejudicial to the defendant. Thus, the court had only the benefit of the testimony of the arresting officer on this crucial issue. The fact

that the arresting officer was the only witness *insured* that defendant's motion would be denied.

Had the defendant been called, the court would have been afforded a better and more evenly balanced perspective of the facts and circumstances surrounding the search and seizure. It would have allowed the court to apply its judgment to those additional facts which were elicited at trial.

If the defendant were called as a witness at the hearing, it is presumed that he would have testified as he did at trial. Therefore, the following should be considered.

The record demonstrates that the defendant had no prior arrest record. The defendant supported two children, served nineteen (19) months in the Marine Corps and served thirteen (13) of those months in Viet Nam. (R. 258) Further, the defendant was a stable man who owned his own home, lived in his community all of his life and worked for one employer for ten (10) years. (R. 258)

At the hearing he would have testified that he did not own a gun. (R. 9, 28); that the arresting officers entered his home with guns drawn; that they did not have a search warrant and that they searched his home without his consent. (R. 178-180, 194)

Reason dictates that police officers responding to a complaint of armed robbery would certainly enter the house with their guns drawn. Under these circumstances there is no doubt that they were going to search with or without defendant's consent. However, the court did not have the benefit of defendant's testimony during the hearing to suppress.

Another question for the court to have considered has a two-fold approach. If the defendant did not know the gun was in his house, as he testified, he may have impliedly consented to the search. However, if he knew the gun was there he would

never have consented to the search. Again, the trial court would have had the opportunity to consider these facts if the defendant had been called as a witness.

The failure to call the defendant at the hearing on the motion to suppress clearly prejudiced the defendant and constituted lack of effective assistance of counsel.

"Effective" normally has been defined as meaningful. Thus, effective counsel would be defined as meaningful assistance of counsel. However, this is not the current standard in Illinois. Rather than being defined as meaning*ful*, effective counsel has been defined as a notch above "meaning*less*. The "farce or sham" and "no representation at all" tests severely strain the common sense definition of effective.

It is extremely hard to conclude that meaningful representation occurs when the arresting officer is the only witness at a suppression hearing. The trial judge could do nothing but deny the motion and the record reflects the importance of this state of the proceedings. The Constitution guarantees a criminal defendant legal assistance which meets a minimum standard of professional representation. Such representation was never evidenced by defense counsel at the pre-trial stage. *United States ex. rel. Williams v. Twomey,* 512 F. 2d 634, 641 (7th Cir. 1975). *cert. denied sub nom. Sielaff v. Williams,* (1975) 423 U.S. 876.

As Justice Clark stated in his special concurring opinion in *People v. Murphy,* 72 Ill. 2d 421, 443:

> Regardless of whether counsel was appointed or retained, the "force or sham" and "no representation at all" tests do not adequately confront the question of whether counsel diligently and competently performed those tasks for which counsel is necessary. Rather, under these tests, there is a natural tendency to point to mistakes which counsel did not make, as proof of his effectiveness,

> and to presume that those mistakes which counsel did make were the result of informed tactical decisions, even though they may in fact have been due to inadequate preparation. (citations omitted)

Thus, in the instant case, on many occasions defense counsel acted vigorously and effectively. However, that does not change the fact that his failure to call the defendant at the motion to suppress constituted ineffective assistance of counsel which fatally prejudiced the defendant's chances at trial.

III.

THE EVIDENCE IS SO UNREASONABLE, IMPROBABLE AND UNSATISFACTORY THAT IT RAISES REASONABLE DOUBTS OF THE DEFENDANT'S GUILT

Fundamental is the power of the Appellate Court to reverse a conviction where the evidence raises a reasonable doubt as to the accused's guilt. *People v. Harper,* 49 Ill. App. 3d 407; *People v. Withers,* 26 Ill. Dec. 177; *People v. Droskiewcz,* 64 Ill. App. 3d 69. Stated differently: it is the duty of the Appellate Court to carefully review the evidence and to reverse the conviction if there is not sufficient evidence to remove all reasonable doubt of defendant's guilt. *People v. Foster,* 56 Ill. App. 3d 22.

Thus, the concept of "reasonable" must be kept foremost in mind when considering the question of the defendant's guilt or innocence in this proceeding.

In *People v. McKinzie,* 18 Ill. 2d 44, the Court commented on the issue of reasonable doubt in a rape case by stating (p. 47):

> "We will consider whether defendant was proved guilty beyond a reasonable doubt. Reviewing courts are especially charged with the duty to

> carefully examine the evidence in rape cases, since accusation of rape is easily made, hard to be proved and still harder to be defended. *People v. Scott,* 407 I., 301.)***"

This Court is well informed that the defense of a rape case is difficult to defend and that hundreds of cases could be cited in support of this proposition. *McKinzie* was cited for its factual similarity to these proceedings.

In *McKinzie* the alleged rape took place in the residence of the defendant; the complainant had the opportunity to leave; the defendant was accused of threatening the complainant with a knife; the defendant denied that he had a knife; a knife was found on the premises; and, the defendant admitted he had intercourse with the prosecutrix. The Court held that the evidence was insufficient to establish the guilt of the defendant beyond all reasonable doubt.

Let us consider the issue of whether there was sufficient evidence to remove *all* reasonable doubt of defendant's guilt by considering the reasonableness of the testimony. Was it reasonable for:

1. The defendant to rape the complainant in his own home?
2. The defendant to rob the complainant with a gun in his own home?
3. The complainant to wait 45 minutes to an hour while the defendant was on the phone if she was in a hurry to go home?
4. For the police officers to have their guns drawn when investigating a charge of armed robbery?
5. For the defendant to consent to a search of his home if he knew there was a gun on the premises while he was accused of armed robbery?

This Court, being comprised of reasonable men, is fully qualified to answer these questions. The answers coupled with

the fact that the prosecution offered no evidence of the recovery of any money although the arrest and search occurred within minutes of the alleged crimes and did not call Marsha Wilson to prove she gave the complainant $80.00 just prior to the alleged crimes raises grave doubts of the defendant's guilt.

Reason dictates and the record clearly demonstrates that the defendant was not proven guilty beyond a reasonable doubt.

CONCLUSION

WHEREFORE, the Defendant, STEPHAN L. McMUTRY, respectfully prays that this Honorable Court grant leave to appeal in this cause.

Respectfully submitted by,

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